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No. 99-1930

Supreme Court, U.S.
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In The

Supreme Court of the United States

SCOTT A. ALBERS,

Petitioner,

v.

MONTANA SUPREME COURT,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Montana

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT AND BRIEF AMICUS CURIAE OF

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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

The Commission on Practice of the Montana Supreme Court, through its Special Counsel, Keith Strong, Esquire, has withheld consent to the filing of the accompanying brief.

Amici all have long-standing involvement in lawyers' professional responsibilities and/or the administration of criminal justice. They offer a distinctive perspective on this case, that is, the concern that ethical, competent representation and the effective assistance of counsel will be chilled by unwarranted and unfair disciplinary action against criminal defense lawyers who give ethical, competent representation.

Accordingly, *Amici* respectfully move for leave to file the accompanying brief.

Respectfully submitted,

MONROE H. FREEDMAN
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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The *Amici* all have backgrounds in professional ethics and/or the administration of criminal justice. They share a deep concern that ethical, competent representation and the effective assistance of counsel will be chilled by unwarranted and unfair disciplinary action against criminal defense lawyers, as has occurred to the Petitioner in the present case. This problem is particularly serious because of professional and public concern throughout the country over the inadequacy of indigent criminal defense, particularly in serious felony cases.

Professor Samuel Dash is Professor of Law and Director of the Institute of Criminal Law and Procedure at Georgetown University Law Center. Professor Dash served as the Senior Consultant to the American Bar Association's *Standards on Administration of Criminal Justice: Prosecution and Defense Function* (1969-1970).

Professor Monroe H. Freedman is the Lichtenstein Distinguished Professor of Legal Ethics at Hofstra University Law School.

Professor Bruce A. Green is the Stein Professor of Law at Fordham University School of Law and Director

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[1] No counsel for any party authored this brief in whole or in part, although Mr. Albers was sent a final draft to ensure that all factual statements are accurate. No one other than the *amici curiae* made a monetary contribution to the preparation or submission of this brief. All work in connection with the brief has been performed *pro bono*.

of the Louis Stein Center for Law and Ethics at Fordham University School of Law.

Professor Geoffrey C. Hazard, Jr., is the Trustee Professor of Law at the University of Pennsylvania Law School.

W. William Hodes is Professor Emeritus of Law at Indiana University.

Mr. Frank B. Morrison is a former Justice of the Montana Supreme Court (1981-1987), former Chairman of the Sentencing Guidelines Commission (1984), and former President of the Montana Trial Lawyers Association (1979-1980).

The National Association of Criminal Defense Lawyers (NACDL) is a national, non-profit, non-partisan organization of criminal defense lawyers which seeks to ensure justice and due process for persons accused of crime or other misconduct. The NACDL is a professional bar association founded in 1958 with more than 10,000 direct members, and 80 local affiliate organizations comprising an additional 28,000 members. These include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges. The mission of the NACDL is to ensure justice and due process for persons accused of crime, foster the integrity, independence and expertise of the criminal defense profession, and promote the proper and fair administration of justice.

The Southern Center for Human Rights is a non-profit, public interest legal project, founded in 1976, to enforce the constitutional protection against "cruel and

unusual punishment" by challenging excessive and degrading forms of punishment and cruel and inhuman conditions of confinement. The Center challenges discrimination against people of color, the poor and the disadvantaged in the criminal justice and corrections systems of the South.

The Criminal Defense Section of the Montana Bar is a voluntary association of members of the Montana Bar practicing in the field of criminal defense.

The Montana Association of Criminal Defense Lawyers is a state-wide organization of 104 criminal defense attorneys. It is the state affiliate of the NACDL. Its mission is to promote study and research in the field of criminal defense law and procedure and constitutional law, and to preserve, protect and defend the adversary system of justice and the State and Federal Constitutions.

ARGUMENT

Petitioner Scott A. Albers has been censured by the Montana Supreme Court, and required to pay $4,578.94 in costs, for conduct that was, in fact, consistent with his obligations to afford his clients competent representation and effective assistance of counsel as a Chief Public Defender. Such disciplinary action threatens to chill ethical, competent representation by lawyers representing

indigent criminal defendants, and also jeopardizes the due process rights of both the lawyers and their clients.[2]

The administration of criminal justice for indigent defendants is in crisis. See, *e.g.* Criminal Justice in Crisis (Report of the Special Committee on Criminal Justice in a Free Society of the American Bar Association, Criminal Justice Section) (ABA, 1988); The Indigent Defense Crisis (Prepared by Richard Klein and Robert Spangenberg for the American Bar Association Section of Criminal Justice, Ad Hoc Committee on the Indigent Defense Crisis) (ABA, 1993). As current reports and commentary in the national media demonstrate, this crisis has become a matter of national concern, particularly in serious felony cases.

"[T]he problem is not that the defense representation is too aggressive but that it is too often inadequate. . . . " Criminal Justice in Crisis at 9. The reasons for this inadequate representation are chronic underfunding and overloading of public defenders, insufficient compensation for court-appointed lawyers, and a lack of training and experience. *See* Criminal Justice in Crisis at 5, 41-43; The Indigent Defense Crisis at 3-9. These conditions have resulted in serious violations of defense lawyers' ethical responsibilities, particularly the obligation of competent representation under Model Rule 1.1 and Model Code DR 6-101. The Indigent Defense Crisis at 8-9.

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[2] Petitioner in his *Petition* has raised serious federal constitutional issues including a lack of due process before the Commission. These Constitutional issues are exacerbated by the chilling effect discussed in this brief.

In this context, Petitioner Albers has been singled out for censure by the Montana Supreme Court, not for inadequate representation, but, rather, for conduct that was consistent with his ethical responsibilities to represent his clients "with commitment and dedication . . . and with zeal in advocacy on [their] behalf." Model Rules of Professional Conduct, Rule 1.3, cmt. [1].

The proceedings against Petitioner Albers were begun by a complaint filed with the Commission on Practice of the Montana Supreme Court by County District Judge Thomas McKittrick. Judge McKittrick charged that Albers had made unethical "personal attacks" against the judge himself, against prosecutors, and against the clerk of court. What the judge characterized as unethical personal attacks, however, were ethical advocacy, and serve to illustrate the kind of representation that Petitioner Albers was giving his clients as Chief Public Defender.

For example, in *State v. Mark Pitzer,* Albers raised the issue of bias and prejudice against Judge McKittrick for the judge's comments to Defendant Pitzer during a sentencing hearing. The basis for raising the issue was the following reproach by the judge to Pitzer, a Native American;[3]

> Why do you folks keep having kids? . . . You're irresponsible in having these kids. The public, we're going to raise those kids. Do you know how babies are born? Do you know how they're conceived? . . . [Is it] a macho thing? . . . [Is it]

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[3] Ex. OO, Document No. 183, Tr. 35-36.

your alcoholism? That forces you to have babies, huh?

Also, the alleged attack on the clerk of court referred to Albers' objection to her practice of telephoning prospective jurors, which effectively limited the number of Native Americans asked to serve. In *State v. Lamere*, however, the Supreme Court of Montana unanimously sustained Albers' challenge to the system of jury summoning in the County.[4] Moreover, in recognition of his work challenging the jury summoning system, the Montana Association of Criminal Defense Lawyers honored Albers as "Criminal Defense Lawyer of the Year."

Similarly, alleged attacks on prosecutors included cases in which Albers properly complained that prosecutors had negotiated directly with Albers' clients without his knowledge or consent, in violation of their ethical obligations as lawyers under Rule 4.2 of the Montana Rules of Professional Conduct.[5]

The Commission ultimately charged Albers formally only with making a false statement of judicial bias and with making an *ex parte* threat intended to disrupt a tribunal. These charges related to a letter from Albers to Judge McKittrick seeking the judge's recusal in *State v. Ambriz*. The basis for Albers' request that the judge recuse himself was that the judge had acted *ex parte* in signing a discovery order. The order required Albers to give the prosecution a doctor's report of an examination that the defense had obtained in the course of preparing

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[4] 2000 Mont. 45, 57 Mont. St. Rep. 214, 228 (2000).

[5] *See, e.g.*, Doc. 170, Tr. 32-33.

its case. The report was contrary to the client's interests, the defense had no intention of calling the doctor to testify, and the report had been sealed. Nevertheless, Judge McKittrick signed the discovery order, which had been prepared by the prosecution, despite the fact that Albers had not seen it or been heard on it.

The Commission justified this *ex parte* conduct by Judge McKittrick and the prosecutor as an aspect of the district court's "routine procedure."[6] The existence of a routine procedure, however, did not make the conduct any less *ex parte*. (For example, the clerk's selective jury summoning procedure had also been "routine" in the district court, but was nevertheless found to have been improper.) Albers was therefore justified in citing Judge McKittrick's *ex parte* communications with the prosecutor as evidence of bias or prejudice, justifying a motion for disqualification. This is particularly so in a matter as important as the judge's signing the prosecutor's *ex parte* order requiring defense counsel to provide discovery of damaging work product to the prosecutor.

After a hearing on the disqualification motion, another judge denied the motion. Subsequently, Albers delivered a letter to Judge McKittrick in chambers without the presence of the prosecutor (who received a copy of the letter shortly thereafter).[7] The letter suggested that Judge McKittrick recuse himself, but it was respectful in tone. Certainly, it was unlike the letter to a judge in *In re*

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[6] Findings of Fact, Conclusions of Law, and Recommendations, Para. 7.

[7] The letter is Document 163.

Snyder, 472 U.S. 634 (1985), which was found by the lower courts to be "totally disrespectful to the federal courts and to the judicial system" and to "demonstrate a total lack of respect for the legal process and the courts." *See* 472 U.S. at 637. Nevertheless, this Court, in an opinion by Chief Justice Warren Burger, reversed disciplinary action against Snyder, relying in part upon the "traditional duties imposed on an attorney." 472 U.S. at 645.

Ironically, despite the "routine procedure" in his court, Judge McKittrick characterized Petitioner Albers' letter as "the most gross *ex parte* contact with a judge that [he had] ever heard of let alone experienced."[8]

In its Findings of Fact, Conclusions of Law, and Recommendations, the Commission found insufficient evidence that petitioner Albers had violated Rule 3.1 (asserting a frivolous issue), Rule 3.3(a)(1) (knowingly making a false statement of material fact or law to a tribunal), or Rule 8.4 (conduct prejudicial to the administration of justice). At para. 17 and 19. The Commission also found insufficient evidence that Albers had violated Rule 3.5(a) (seeking to influence a judge by means prohibited by law) or Rule 8.4(d) (conduct prejudicial to the administration of justice). At para. 18.

Particularly in the light of those holdings, the Commission's findings against Albers are paradoxical. The Commission found that Albers had violated Rule 8.2(a) (false statement about a judge in reckless disregard of its falsity) by questioning Judge McKittrick's integrity and

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[8] Findings of Fact, Conclusions of Law, and Recommendations, para. 14.

impartiality in the *Ambriz* case. At para. 20. Thus, the Commission found that Albers had filed a pleading based on a false statement of fact, in reckless disregard of its falsity, even though the Commission had previously found (in para. 17) that Albers' action had not been frivolous. Indeed, the Commission further found that "Albers was justifiably concerned that Judge McKittrick's . . . discovery order, issued without notice or a hearing, required disclosure of what had theretofore been the sealed [doctor's] report, a report damaging to Ambriz's defense." At para. 24.

With similar inconsistency, the Commission found that Albers had violated Rule 8.4(d) (conduct prejudicial to the administration of justice) because he had publicly objected to what was a "routine procedure." At para. 21. It also found that Albers had violated Rule 3.5(b) (improper *ex parte* communication) because he had engaged in the procedure (already justified by the Commission as "routine") of presenting his letter to the judge in chambers. At para. 22.[9] The Commission also found that Albers' delivery of the letter to the judge "minutes before a hearing" had been "intended to disrupt a tribunal" in violation of Rule 3.5(c). At para. 22.

In sum, the Commission concluded that "Albers was justifiably concerned that Judge McKittrick's . . . discovery order, issued without notice or a hearing, required disclosure of what had theretofore been the

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[9] Albers cannot properly be disciplined for following a "routine procedure" of the court even while protesting its propriety. The two acts are not mutually exclusive, nor do they constitute unethical conduct.

sealed [doctor's] report, a report damaging to Ambriz's defense." At para. 24. Nevertheless, the Commission faulted Albers because he "recklessly accuse[d] Judge McKittrick of bias on the eve of trial in an attempt to disqualify him for cause." It added, "He then compounded his error with *ex parte* correspondence." At para. 24. Instead, in the view of the Commission, Albers should have "address[ed] the illegitimate statutory and constitutional issues created by the . . . district court's 'routine procedure' and the . . . discovery order."

These findings by the Commission are not consistent with each other, with the ethical rules relied upon, or with a defense counsel's obligation to represent his clients "with commitment and dedication . . . and with zeal in advocacy on [their] behalf." Model Rules of Professional Conduct, Rule 1.3, cmt. [1]. Essentially, the Commission disagreed with Albers' tactical decision to move to disqualify the judge, even though the Commission recognized that the motion had been based upon Albers' "justifiabl[e] concern[ ] that Judge McKittrick's . . . discovery order, issued without notice or a hearing, required disclosure of what had theretofore been the sealed [doctor's] report, a report damaging to Ambriz's defense." At para. 24.

In view of the obvious importance of the order, and the fact that the judge had signed it *ex parte*, Albers' tactical decision to seek to disqualify the judge was well within the "wide range of reasonable professional assistance," as to which courts must "indulge a strong presumption" of propriety. *Nix v. Whiteside*, 475 U.S. 157, 165 (1986), quoting *Strickland v. Washington*, 466 U.S. 668, 689

(1984). Indeed, Rule 47 of the Eighth Judicial District provided:[10]

> The Court will not receive letters or other communication from counsel which do not indicate on their face that copies have been sent to opposing counsel. . . . [11] A violation of this rule may result in a disqualification of the judge for cause.

CONCLUSION

The issues in this case are of far-reaching importance to the ethical responsibilities of lawyers in criminal cases, to the effective assistance of counsel, and to the due process rights of lawyers and their clients. Particularly at a time when there is widespread professional and public concern with the adequacy of representation in indigent criminal cases, disciplinary action against a lawyer who has given ethical, competent representation sends the wrong message to the bar and to the public about our commitment to our ethical and constitutional ideals.

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[10] Commission Exh. LL. This rule was in force at the time Albers acted under it, but was withdrawn on the very day the Commission heard this case.

[11] The prosecutor's order did not indicate on its face that it had been sent to Albers, nor was it sent to him until it had been signed by the judge. By contrast, Albers' letter indicated on its face that the prosecutor would receive a copy, and that did occur.

Accordingly, *Amici* respectfully urge that the petition for a Writ of Certiorari be granted.

Respectfully submitted,

MONROE H. FREEDMAN
Counsel of Record

July 3, 2000.